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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ADOLPHUS LEE MAJORS,

Defendant and Appellant.

B209278

(Los Angeles County
Super. Ct. Nos. BA311932,
BA319076)

APPEAL from a judgment of the Los Angeles County Superior Court, Kathleen Kennedy-Powell, Judge. Affirmed in part; reversed in part and remanded with directions.

Gideon Margolis, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E. Winters and Russell A. Lehman, Deputies Attorney General, for Plaintiff and Respondent.

After repeatedly violating the terms and conditions of his probation, appellant Adolphus Majors's probation was revoked. He was sentenced to state prison, and various fines and penalties were assessed against him in each of the actions at issue here, including a laboratory service fee under Penal Code section 1463.14, subdivision (b), and a "court construction fine" of \$135, pursuant to Government Code section 70372. We conclude the lab fee was assessed under an inapplicable statute, and the court's calculation of the amount of the construction fine was both (1) premised, at least in part, on restitutionary fines and security fees which may not form a basis for a penalty assessment, and (2) derived from an erroneous formula. We also conclude the trial court failed to assess probation revocation fines, which are due and payable. We will strike the order assessing the inapplicable lab fee, and order the trial court to correct the abstract of judgment to reflect the proper amount of the construction fines and the imposition of probation revocation fines. We shall affirm the remainder of the judgment as modified.

BACKGROUND

In a complaint filed in November 2006, in Case No. BA311932, appellant was charged with: (count 1) felony possession of cocaine in violation of Health and Safety Code section 11350, subdivision (a), and (count 2) misdemeanor possession of a smoking device in violation of Health and Safety Code section 11364, subdivision (a).

In December 2006, pursuant to a negotiated plea agreement, appellant pleaded no contest to count 1. Appellant was placed on formal probation for three years, under the terms of Proposition 36. (Pen. Code, §§ 1210, 1210.1, 3063.1.) The trial court ordered appellant to pay a \$200 restitution fine (Pen. Code, § 1202.4, subd. (b)), a \$50 lab analysis fee (Health & Saf. Code, § 11372.5), a \$200 drug treatment program assessment fee (Pen. Code, § 1210.1, subd. (a)), and a \$20 court security fee (Pen. Code, § 1465.8, subd. (a)(1).) The court also imposed, but stayed, a probation revocation restitution fine of \$200. (Pen. Code, § 1202.44.) Count 2 was dismissed.

Appellant failed to report to his probation officer or to appear for his first progress hearing. At the probation revocation hearing in April 2007, he admitted he had violated

the terms of his probation, which the trial court revoked, and then reinstated on the same terms.

In mid-March 2007, a two-count complaint was filed in Case No. BA319076. Appellant was again charged with one felony count for possession of cocaine (Health & Saf. Code, § 11350, subd. (a)), and one misdemeanor count of possession of a smoking device (Health & Saf. Code, § 11364, subd. (a)). The complaint also alleged that appellant had served two prior prison terms within the meaning of Penal Code section 667.5, subdivision (b). Based on the filing of Case No. BA319076, the prosecutor sought revocation of appellant's probation in Case No. BA311932.

A plea agreement was struck. Pursuant to that agreement, appellant pleaded guilty to the felony count, and the misdemeanor count was dismissed. Appellant admitted having violated the terms of his probation in Case No. BA311932. His probation in that case was revoked and reinstated on the same terms. Imposition of sentence was suspended, and appellant was placed on formal probation for three years, under Proposition 36. He was ordered to pay a \$200 restitution fine (Pen. Code, § 1202.4, subd. (b)), a \$50 lab analysis fee (Health & Saf. Code, § 11372.5), a \$20 court security fee (Pen. Code, § 1465.8, subd. (a)(1), and a \$200 drug treatment program assessment fee (Pen. Code, § 1210.1, subd. (a).) The court also imposed, but stayed, a probation revocation restitution fine of \$200. (Pen. Code, § 1202.44.) Count 2 was dismissed.

In May 2007, the prosecutor requested that appellant's probation in case Nos. BA311932 and BA319076 be revoked in lieu of a new prosecution. Appellant admitted, and the court found, that he had violated the terms of his probation. Appellant's probation was revoked and reinstated, with the added condition that he serve 270 days in county jail in case No. BA311932. Appellant was ordered to pay a \$200 restitution fine (Pen. Code, § 1202.4, subd. (b)), a second \$200 drug treatment program assessment fee (Pen. Code, § 1210.1, subd. (a), a \$50 narcotics analysis fee (Health & Saf. Code, § 11372.5), a \$50 laboratory service fund assessment (Pen. Code, § 1463.14, subd. (b),

and a \$20 court security fee (Pen. Code, § 1465.8, subd. (a)(1).) The court also imposed a \$200 probation revocation restitution fine. (Pen. Code, § 1202.44.)

In March 2008, a complaint was filed in Case No. BA337250, charging appellant with one felony count for possession of cocaine. (Health & Saf. Code, § 11350, subd. (a).) Based on his arrest in this latest action, appellant's probation in Case Nos. BA311932 and BA319076 was revoked preliminarily.

After a contested probation revocation hearing, the court found appellant violated the terms of his probation in Case Nos. BA311932 and BA319076. Probation was revoked and appellant was sentenced to state prison for an aggregate term of two years and eight months: the middle term of two years on count 1 in Case No. BA311932, and a consecutive term of one-third of the middle term, or eight months, on count 1 in Case No. BA319076. Appellant was ordered to pay all previously imposed fines and court security fees for each count, pursuant to Penal Code section 1465.8, subdivision (a)(1), and a court construction fee of \$135 as to each case. The court also imposed, but stayed, a \$200 parole revocation fine, pursuant to Penal Code section 1202.45. In the interest of justice, the trial court dismissed the complaint in Case No. BA337250. (Pen. Code, § 1385.)

DISCUSSION

1. Penalties were erroneously assessed under Penal Code section 1463.14.

Although it is not reflected in the abstract, the trial court imposed a \$50 “laboratory service fund” assessment as to each case. (Pen. Code, § 1463.14, subd. (b).) Appellant insists this fine was erroneously assessed and must be stricken. We agree.

Penal Code section 1463.14, subdivision (b), gives a county discretion to impose an “alcohol testing penalty” of no more than \$50 in an appropriate case in which the defendant is convicted of driving under the influence, in violation of Vehicle Code sections 23152 or 23153. The people concede that Penal Code section 1463.14, subdivision (b) is inapplicable here, where appellant was not convicted of a violation of Vehicle Code section 23152 or 23153. That concession is appropriate. The fine imposed

under Penal Code section 1463.14, subdivision (b), as reflected in the July 2, 2007 and June 13, 2008 minute orders, must be stricken.

2. *The abstract of judgment requires correction*

We further conclude clerical errors in the abstract of judgment warrant correction. “‘It is not open to question that a court has the inherent power to correct clerical errors in its records so as to make these records reflect the true facts.’ . . . Courts may correct clerical errors at any time.” (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) An abstract of judgment that does not accurately reflect the trial court’s pronouncement constitutes a clerical error subject to correction. (*Ibid.*) As a general rule, we will harmonize a record when it is in conflict. (*People v. Smith* (1983) 33 Cal.3d 596, 599; *In re Evans* (1945) 70 Cal.App.2d 213, 216.)

a. *Construction fines were both improperly assessed against restitution and security fees, and improperly calculated*

As to each case, the trial court imposed a “court construction fine of one half of the other total fines in the case which is going to be \$135.” Appellant maintains that to the extent this construction penalty was calculated based on restitution fines and security fees imposed against him, it is improper. He also asserts that ambiguities in the record as to the total fines on which the \$135 construction fine was assessed require remand for clarification. Appellant’s first contention has merit. And, although we agree with appellant’s assertion that the abstract requires correction to accurately reflect the proper construction fines, we conclude we may order those corrections without need for additional sentencing proceedings before the trial court.

In Case No. BA311932, the trial court imposed a \$200 restitution fine (Pen. Code, § 1202.4, subd. (b)), a \$50 lab fee (Health & Saf. Code, § 11372.5, subd. (a)), a \$50 lab fee (Pen. Code, § 1463.14, subd. (b)), a \$200 drug treatment program assessment fee (Pen. Code, § 1210.1, subd. (a)),¹ and a \$20 court security fee (Pen. Code, § 1465.8).

¹ We note an additional error requiring correction, not addressed by the parties. The trial court imposed this \$200 drug treatment program restitution fee (Pen. Code,

The court also imposed, but stayed, a \$200 probation revocation fine (Pen. Code, § 1202.44.) Identical assessments were imposed in Case No. BA319076.

The court also imposed a “construction fine” of \$135 as to each case. This construction fine, which was to have been assessed at \$5 for every \$10 of the total fines imposed in each case, was calculated improperly. Under the Government Code, the trial court is to levy a construction penalty of \$5 for every \$10, or part thereof, on “every fine, penalty, or forfeiture imposed and collected . . . for all criminal offenses . . .” (Gov. Code, § 70372, subd. (a)(1).) According to this statute, even if all the fines in these actions been properly imposed, and were proper bases on which to base the construction penalty, the fine would have been \$260, not \$135.²

This mathematical mistake, however, is not material because the court made an even more fundamental error: No construction penalty should have been imposed on the restitution fines imposed under Penal Code sections 1202.4, subdivision (b), 1210.1, subdivision (a), (Pen. Code, § 1202.44 [the (unimposed) probation revocation fine]), (Pen. Code, § 1202.45 [the suspended parole revocation fine]), or the \$20 security fee. Government Code section 70372, subdivision (a)(3)(A) expressly prohibits assessment of a construction penalty against any “restitution fine.” The court security fees imposed pursuant to Penal Code section 1465.8, subdivision (a)(1) are also exempt from penalty assessments. (Gov. Code, § 1465.8, subd. (b).)

§ 1210.1, subd. (a)) and later, at sentencing, ordered appellant to pay all previously imposed fees and fines. The abstract of judgment, however, fails to reflect this fine. In the interest of judicial economy, and because the omission is clear, we will order the abstract of judgment to be modified without requesting supplemental briefing. (*People v. Talibdeen* (2002) 27 Cal.4th 1151, 1153–1157; *People v. Taylor* (2004) 118 Cal.App.4th 454, 456.)

² As discussed below, the court also failed to impose probation revocation fines which would have also increased the amount of the construction fine. (Pen. Code, § 1202.44.)

b. Construction fine imposed against the lab fee was improperly calculated

The \$50 lab analysis fee reflected in the abstract was properly imposed under Health and Safety Code section 11372.5. A construction fine may be imposed against those fees, upon a proper calculation. However, the calculation employed by the trial court here to arrive at the amount of that fine was not correct.

For reasons into which we need not delve, but which are explained in *People v. McCoy* (2007) 156 Cal.App.4th 1246, the construction penalty calculation differs for defendants convicted in Los Angeles County. According to *McCoy*, “in Los Angeles County, every convicted felon must pay on a Health and Safety Code section 11372.5, subdivision (a) laboratory fee a \$3 state court construction penalty on every \$10 of the fee, which is statutorily designated as a fine.” (*Id.* at p. 1254.) Accordingly, for each \$50 laboratory fee assessed under Health and Safety Code section 11372.5, subdivision (a), the state court construction penalty to be added to the judgment is \$15. (*Ibid.*) In addition, the \$50 laboratory analysis fee imposed under Health and Safety Code section 11372.5, subdivision (a) is subject to a 20 percent (\$10) surcharge under Penal Code section 1465.7, subdivision (a). (*Id.* at p. 1257.) Thus, the abstract of judgment must be modified to strike the \$135 “court construction fine” imposed. Instead, as to each case, the abstract must reflect a \$15 court construction penalty (Gov. Code, § 70372, subd. (a)(1)), plus a \$10 state surcharge (Pen. Code, § 1465.7, subd. (a)), for each laboratory analysis fee.

c. The abstract of judgment must reflect the probation revocation fines

Once a defendant’s probation is revoked, the court must lift the stay of the probation revocation restitution fine. At that point the fine is due and payable. (*People v. Guiffre* (2008) 167 Cal.App.4th 430, 434–435.) “On motion of a party, . . . or on its own motion, the reviewing court may order correction . . . of any part of the record.” (Cal. Rules of Court, rule 8.155(c)(1); see also *People v. Mitchell*, *supra*, 26 Cal.4th at pp. 185–188; *People v. Boyde* (1988) 46 Cal.3d 212, 256.) Accordingly, the abstract of judgment must be modified to reflect that the \$200 probation revocation restitution fine

imposed as to each case is due. (*People v. Guiffre, supra*, 167 Cal.App.4th at p. 435; Pen. Code, § 1202.44.)

DISPOSITION

The abstract of judgment shall be modified to impose the following financial obligations as to Case No. BA311932 and as to Case No. BA319076: *Item 9.a.*: \$200 restitution fine (Pen. Code, §§ 1202.4, subd. (b), 2085.5); \$200 probation revocation fine (Pen. Code, § 1202.44); \$200 parole revocation fine (Pen. Code, § 1202.45); *Item 9.c.*: \$50 laboratory analysis fee (Health & Saf. Code, § 11372.5, subd. (a)); *Item 9.d.*: \$20 court security fee (§ 1465.8); and *Item 11*: \$200 drug treatment program restitution fee (Pen. Code, § 1210.1, subd. (a)); \$15 court construction penalty (Gov. Code, § 70372, subd. (a)(1); and a \$10 state surcharge (Pen. Code, § 1465.7, subd. (a)). The trial court is directed to prepare a corrected abstract of judgment to reflect these fees and assessments. The court is further directed to strike the references in the July 2, 2007 and June 13, 2008 minute orders to the lab fee imposed under Penal Code section 1463.14, subdivision (b). Finally, the trial court is directed to forward to the Department of Rehabilitation and Corrections a copy of the corrected abstract. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

CHANEY, J.